In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1589

JERRY DAWKINS, et al.,

Petitioner

versus

NABISCO, INC. BAKERY and CONFECTIONARY UNION LOCAL NO. 42

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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LIST OF AUTHORITIES

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The Petitioner, Jerry Dawkins is appearing pro se, I respectfully pray that this Court will read liberally my petition for a Writ of Certiorari, to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 25, 1977.

OPINION BELOW

A Pro Se Motion to reopen Civil Action No. 16431, denied by the United States District Court for the Northern District of Georgia, affirmed by the United States Court of Appeals for the Fifth Circuit two opinions is appended to this petition hereto.

JURISDICTION

The Judgment of the United States Court of Appeals for

the Fifth Circuit was entered March 25, 1977. This petition was filed within ninety (90) days of that date. This Court's Jurisdiction is invoked pursuant to U.S.C. § 1343 (4); 42 U.S.C. § 200 3-5 (f) and 28 U.S.C. §§ 2201 and 2202 also 29 U.S.C. §151 et seq.

QUESTION PRESENTED

(1) Whether the United States District Court for the Northern District of Georgia can block and completely destroy a job discrimination class action lawsuit.

(2) Whether the District Court can prohibit the Petitioner from fairly and adequately representing and protecting the interests of all members of the class, if the class is so numerous that joinder of all members is impracticable, Rule 23(A) Federal Rules of Civil Procedure.

(3) Whether the District Court or the Court of Appeals can deny the Petitioner retroactive seniority; the Petitioner first filed a complaint with the Equal Employment Opportunity Commission on July 28, 1971, in an attempt to obtain retroactive seniority from the time of discrimination in the summer of 1956, and the years of 1959 and 1960; Nabisco merged the men and women seniority list in 1971 to avoid sex discrimination and Blacks, as a class, hired after the effective date of the Civil Rights Act dropped to the bottom rung of the seniority ladder, the U.S. Supreme Court's decision, Frank v. Bowman March 24, 1976 was remanded back to the U.S. Court of Appeals for the Fifth Circuit.

(4) *Whether case No. 16431 can be reopened because the Federal Courts completely destroyed the class action, and*

denied the Petitioner retroactive seniority, the trial testimony of the Petitioner in Civil Action File No. 16431 is the gravamen for retroactive seniority.

CONSTITUTIONAL PROVISIONS INVOLVED

(1) Federal Rules of Civil Procedure, Rule 23(A) Class Action: one or more members of a class may sue or be sued as representative parties on behalf of all only if: (1) The class is so numerous that joinder of all members is impracticable, (2) There are questions of law of fact common to the class, (3) The claims or defense of the representative parties typical of the claims or defense of the class, and (4) The representative parties will fairly and adequately protect the interests of the class.

(2) The Civil Rights Act of 1964 42 U.S.C. Sec. 2000e.

(3) The Civil Rights Act of 1866 42 U.S.C. Sec. 1981.

(4) President John F. Kennedy's Executive Order 10925, July 1960 which established the President's Committee on Equal Employment Opportunity Commission.

(5) United States Supreme Court's decision *Harold Franks v. Bowman Transportation Company*, No. 74-728 decided March 24, 1976.

(6) United States Supreme Court's decision *Albermarle Paper Co. v. Moody*, No. 74-389 decided June 25, 1975.

STATEMENT OF THE CASE

In the trial of October 1st and 2nd 1973 in the United States District Court for the Northern District of Georgia,

the Attorneys for the Petitioner and the presiding Judge Charles A. Moye, Jr. instructed the Petitioner not to talk about the class, but to talk only about the past discrimination in hiring and retroactive seniority, and on October 2, 1973 Judge Moye ruled from the bench against the Petitioner for retroactive seniority, the Attorneys for the Petitioner appealed to the United States Court of Appeals for the Fifth Circuit, without the record, the appendix, neither the transcript, and on July 30, 1975 the Fifth Circuit Court of Appeals affirmed without published opinion, the Petitioner terminated his Attorneys for not fighting the Federal Courts for destroying the Class.

REASON FOR GRANTING THE WRIT

The Petitioner obtained the transcript in No. 16431 and on June 1, 1976 filed an independent motion to reopen No. 16431, attached to the motion were two U.S. Supreme Court Landmark Exhibits, *Harold Frank v. Bowman Transportation Co.*, No. 74-728 decided March 24, 1976 and *Albemarle Paper Company v. Moody*, No. 74-389 decided June 25, 1975.

The pro se motion was filed on three counts, the class had been completely destroyed by the District Court and for a court order to award the Petitioner retroactive seniority from the time of the original discrimination, the summer of 1956, and for continuous harassment and on July 13, 1976 the Petitioner filed a new complaint in Federal District Court, No. C76-1165A and on September 9, 1976 the District Court consolidated No. C76-1165A with No. 16431 and denied the motion to reopen, on September 15, 1976 the Petitioner filed a Notice of Appeal to the Fifth Circuit, and on March 25, 1977 the Court of Appeals for the Fifth

Circuit affirmed the District Court with respect to No. 16431, but reversed and remanded with respect to C76-1165A.

Case No. 16431 must be reopened because hundreds of White women and approximately forty (40) Blacks have been victims of sex and race discrimination at Nabisco, for over fifty years, some who have now retired, have not had their day in court. The Blacks were hired only to do janitorial work. The only way the Petitioner, Jerry Dawkins can claim retroactive seniority is to reopen No. 16431 review the Petitioner's trial testimony of October 1, 1973.

Recent further investigations by the Petitioner have revealed that in September of 1954, White men were victims of job and sex discrimination at Nabisco; they were removed from the machine classification positions and replaced by White women whose pay was much less, in an effort to utilize cheap labor.

CONCLUSION

For the serious reasons stated, a Writ of Certiorari should be issued to review the judgment and opinions of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served three copies each, of the petition for Writ of Certiorari on the Counsels for the Respondents, postage prepaid to:

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This the day of May, 1977.

Jerry Dawkins,
Petitioner Pro Se

APPENDIX A

PER CURIAM

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-3992

JERRY DAWKINS and DOUGLAS GRAY,
Plaintiffs-Appellants,

versus

NABISCO, INC. and BAKERY and CONFECTIONARY
UNION LOCAL NO. 42,
Defendants-Appellees

Appeal from the United States District Court for the
Northern District of Georgia

(June 30, 1975)

Before GOLDBERG and RONEY, Circuit Judges and LYNNE, District Judge.

PER CIRUAM: AFFIRMED. See Local Rule 21.[1]

This case was briefed and argued by appellants as a class action. Plaintiffs were denied the right to prosecute this case as a class action by the district court, and we can find no reversible error in such ruling.

1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

The resolution of issues of fact in cases arising under Title VII is given the same deference on appeal as in non-civil rights cases, *i.e.*, we examine only whether the lower court's finding is "clearly erroneous." *Martin v. Thompson Tractor Co.*, 486 F.2d 510, 512 (5th Cir. 1973); *Smith v. Delta Air Lines, Inc.*, 586 F.2d 512, 514 (5th Cir. 1973); *Bradley v. Southern Pacific Co.*, 486 F.2d 516, 517-518 (5th Cir. 1973). To obtain relief in our Court, therefore, the two plaintiff employees must show the district court to be clearly erroneous in its detailed findings of fact that the plaintiffs themselves have not been discriminated against in violation of Title VII or 42 U.S.C.A. § 1981. Although the plaintiffs point to certain evidence from the record that might support a *prima facie* assertion of some kind of discrimination against somebody by the employer, it does not compel a finding of discrimination against these plaintiffs. The plaintiffs having the burden of proof, it is incumbent on them on appeal to show that they carried that burden in the trial court. No transcript of the testimony has been filed with this Court even though one is required by Rule 10 (b), F.R.App. P., when the district court's finding are attacked as clearly erroneous. On the record before us, we cannot determine that there was insufficient evidence before the district court to support its findings of fact. *See, e.g., United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 126 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973); *Green v. Aetna Ins. Co.*, 397 F.2d 614, 619 (5th Cir. 1968). We cannot hold the district court to be clearly erroneous.

OPINION OF CIRCUIT COURT OF APPEALS

Jerry DAWKINS, Plaintiff-Appellant

v.

NABISCO, INC., and Bakery and Confectionary Union Local No. 42, Defendants-Appellees

NO. 76-3738

Summary Calendar.*

United States Court of Appeals, Fifth Circuit

March 25, 1977

In two Title VII actions, the United States District Court for the Northern District of Georgia at Atlanta, Charles A. Moye, Jr., J., entered judgment adverse to plaintiff and plaintiff appealed. The Court of Appeals held that 1972 judgment resolving employee's claim that employer and union had retaliated against employee for participation in early Title VII proceedings were not res judicata as to suit based on post-1973 retaliation for participation in the same Title VII proceedings.

Affirmed as to one action; reversed and remanded as to section action.

1. Courts - 405(16.16)

Record on appeal from judgment adverse to plaintiff in Title VII action disclosed no basis for reopening judgment.

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* Rule 18, 5 Cir.; *see Isbell Enterprises, Inv. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part 1.

Civil Rights Act of 1964, § 704(b), 42 U.S.C. § 2000e-3(a); Fed. Rules Civ. Proc. rule 60(b), 28 U.S.C.A.

2. Federal Civil Procedure - 656

Pro se complaint in Title VII action would be read liberally. Civil Rights Act of 1964, §701 et seq., 42 U.S.C.A. § 2000e et seq.

3. Judgment - 739

Judgment entered in 1972 Title VII action in which employee alleged that employer and union had retaliated against employee for his participation in earlier Title VII proceedings was not res judicata as to suit for post-1973 retaliation for participation in the same Title VII proceedings. Civil Rights Act of 1964, §701 et seq., 42 U.S.C.A. § 2000e et seq.

4. Judgment - 634

Among the goals of res judicata is inducing litigants to economize on law suits.

5. Judgment - 720

Judgment in 1972 Title VII action had collateral estoppel effect and precluded employee from relitigating in 1976 Title VII action issues actually resolved against him in the 1972 action. Civil Rights Act of 1964, § 704(b), 42 U.S.C.A. § 2000e-3(a); Fed. Rules Civ. Proc. rule 60(b), 28 U.S.C.A.

Appeal from the United States District Court for the Northern District of Georgia.

Before GOLDBERG, CLARK and FAY, Circuit Judges.

PER CURIAM:

Before us on this appeal is a district court judgment disposing of two Title VII actions adversely to the plaintiff. Appellant Jerry Dawkins, an employee of Nabisco, brought both actions against the company and his union, the first in 1972 (No. 16431) and the second in 1976 (No. C76-1165A) Both actions claim, among other things, that appellees have retaliated against Dawkins for his participation in earlier Title VII proceedings, thus violating 42 U.S.C. § 2000e-8(a).

I.

[1] Trial of the first action resulted in a judgment against Dawkins in 1973, and this court affirmed without published opinion. *See* 515 F.2d 1181, 5 Cir. In June 1976 Dawkins moved to reopen the judgment. The district court denied the motion, and Dawkins appeals. We find no basis for reopening the judgment and therefore affirm. *See* Fed. R. Civ. P. 60(b).

II.

In the more recent action the district court dismissed Dawkins' complaint, relying solely on the res judicata effect of the earlier judgment. We conclude that the causes of action underlying the two complaints are not identical,

and we therefore reverse and remand for further proceedings. *See generally* F. James, Civil Procedure § 11.10 (1965); *Stevenson v. International Paper Co.*, 516 F.2d 103 (5th Cir. 1975).

[2,3] Reading the 1976 pro se complaint liberally, as we must, we find that it alleges discrimination more recent than the termination of the 1972 action. Therefore, although the 1972 action resolved a claim of retaliation for participation in the same Title VII proceedings, the earlier action did not and could not resolve the claim based on post-1973 retaliation.

[4,5] Among the goals of the res judicata doctrine is inducing litigants to economize on lawsuits, but we could not possibly expect Dawkins to litigate a claim based on 1975 retaliation in a law-suit that terminated in 1973. Were we to rule that the 1973 adjudication was somehow dispositive of the factual dispute regarding alleged subsequent retaliation, a company that had once won a suit alleging retaliation for participation in Title VII proceedings would be free to retaliate at will against the earlier plaintiff without fear of being held accountable for its actions. The law of res judicata establishes no such result. The judgment in the earlier suit does not bar Dawkins' 1976 action.[1]

Our result means that a Title VII plaintiff is free to bring successive actions, claiming in each that his employer has taken retaliatory actions against him more recent than the prior lawsuit. That prospect, however, does not impel us to

1. The earlier judgment does, of course, have collateral estoppel effect. Dawkins will not be free to relitigate factual issues actually resolved against him in the earlier litigation.

depart from settled res judicata principles. There are other methods for dealing with frivolous lawsuits.

The order of the district court is AFFIRMED with respect to No. 16431 and REVERSED and REMANDED with respect to No. C76-1165A.